11-17-2016

State v. Ivie Respondent's Brief Dckt. 44119

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44119**
Plaintiff-Respondent,	)	
	)	**Kootenai County Case No.**
v.	)	**CR-2015-10396**
	)	
REGINALD JAMES IVIE,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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STATEMENT OF THE CASE

Nature Of The Case

Reginald James Ivie appeals from his judgment of conviction for lewd conduct with a child. He challenges his sentence as excessive.

Statement Of The Facts And Course Of The Proceedings

D.I. is Ivie's 13-year-old niece. (PSI, pp. 2, 18.) When D.I.'s mother found a picture of Ivie's erect penis on D.I.'s cell phone she talked to D.I., who told her that Ivie had raped her twice the previous month. (PSI, pp. 18, 23-24.)

In a subsequent CARES interview D.I. disclosed that Ivie was babysitting her when her father and stepmother had gone to Las Vegas to be married. (PSI, p. 19.) Together they smoked marijuana and Spice until D.I. started hallucinating and went to bed. (PSI, pp. 19-20.) She woke up later because Ivie was masturbating while grabbing her butt over her yoga pants. (PSI, pp. 19-21.) She thereafter "blacked out" and when she woke up she was naked, Ivie was next to her, also naked, and her vagina was red and sore. (PSI, pp. 20-21.)

D.I. avoided Ivie the next day, and again smoked Spice, and again during the night Ivie came into her room and rubbed his penis against her, this time over her protests. (PSI, pp. 20-22.) He then put his hands down her pants and started touching her genitals. (PSI, p. 22.) She again passed out, and when she woke up the next morning she and Ivie were again naked in the bed and she was again sore and was bleeding from her vagina. (PSI, pp. 20, 22.) Later in the interview D.I. emotionally disclosed that she actually did have a memory of Ivie putting his penis in her vagina on those two nights. (PSI, pp. 24-25.)

The state charged Ivie with lewd conduct with a child. (R., pp. 62-63.) Pursuant to a plea agreement whereby the state agreed not to pursue additional charges Ivie pled guilty. (R., pp. 66-68.) The district court imposed a sentence of life with seven years fixed. (R., pp. 72-74.) Ivie filed a notice of appeal timely from the entry of judgment. (R., pp. 75-77.)

ISSUE

Ivie states the issue on appeal as:

> Was Mr. Ivie's sentence excessive in light of Ivie's lack of prior record and the information provided to the Court at sentencing?

(Appellant's brief, p. 1 (underlining omitted and capitalization altered).)

The state rephrases the issue as:

Has Ivie failed to demonstrate the district court abused its discretion when it imposed a sentence of life with seven years fixed upon Ivie's conviction for lewd conduct with a child?

ARGUMENT

Ivie Has Failed To Demonstrate The District Court Abused Its Discretion When It Imposed A Sentence Of Life With Seven Years Fixed Upon Ivie's Conviction For Lewd Conduct With A Child

A. Introduction

The district court imposed a sentence of life with seven years fixed upon Ivie's conviction for lewd conduct with his 13-year-old niece. (R., pp. 72-74; Tr., p. 25, L. 8 – p. 29, L. 3.) Ivie argues the district court abused its discretion, claiming the sentence was "arbitrary" because the district court "did not consider all the mitigating factors." (Appellant's brief, p. 4.) Ivie further claims the district court acted on "passion and prejudice." (Appellant's brief, p. 10.) Ivie is merely requesting the appellate court to re-weigh the evidence, and has therefore failed to show an abuse of discretion. Review of the record supports the sentence.

B. Standard Of Review

"Where the sentence imposed by a trial court is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion." State v. Miller, 151 Idaho 828, 834, 264 P.3d 935, 941 (2011) (quotations and citations omitted). "In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ." Id.

C. Ivie Has Failed To Show The District Court Abused Its Sentencing Discretion

The applicable legal standards for reviewing a sentencing court's exercise of discretion are well-established. Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion.

State v. Windom, 150 Idaho 873, 875, 253 P.3d 310, 312 (2011); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Windom, 150 Idaho at 875, 253 P.3d at 312 (citations omitted). A sentence is reasonable, however, if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id. at 875-76, 253 P.3d at 312-13; State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001).

The district court found the facts of the case "beyond disturbing." (Tr., p. 25, Ls. 20-21.) As set forth above in the statement of facts, this characterization is entirely warranted. While babysitting his 13-year-old niece, Ivie, then age 37, used drugs with her and then sexually touched her and had intercourse with her on consecutive nights; the second time over her protests. (PSI, pp. 2, 18-25.) The mental strain from the abuse caused D.I. to be committed to a mental health facility. (PSI, pp. 3, 58.) The facts of the crime alone justify the sentence, and Ivie does not argue otherwise.

The district court further found that Ivie had not shown remorse to the victim. (Tr., p. 25, Ls. 22-24.) It also found that Ivie had not taken steps to obtain treatment and that there was no convincing evidence that Ivie presented a low risk of re-offense. (Tr., p. 26, L. 19 – p. 27, L. 13.) These finding are supported by the record. Ivie ultimately confirmed most of the events described by D.I., but in his version D.I. seduced him and he was the victim, stating, "I feel like I was taken advantage of … by a nympho teenager." (PSI, pp. 37-38; see also pp. 41-

50.) This is the version of events Ivie maintained through sentencing. (PSI, p. 107.) The district court found Ivie's version of events "absolutely incredible" and "completely unbelievable." (Tr., p. 27, Ls. 14-25.) The district court's findings of lack of remorse and the absence of rehabilitation potential are supported by the record.

Ivie asserts the district court should have found that he was remorseful because he said he was, and that he was amenable to treatment, a finding the district court refused to make because deception was indicated in the polygraph. (Appellant's brief, pp. 5-7.) This argument fails because it merely requests re-weighing of the evidence by the appellate court. See Windom, 150 Idaho at 879, 253 P.3d at 316 ("In this case, Windom essentially asks this Court to re-weigh the evidence presented to the district court and reach a different conclusion …. However, our role is not to reweigh the evidence considered by the district court; our role is to determine whether reasonable minds could reach the same conclusion as did the district court.").

The district court stated that seven years fixed was appropriate because "there is nothing in what I've been presented today that would make me think that anything less than seven years is what [Ivie] need[s] for punishment, for the protection of society, for [his] victim who can become of age." (Tr., p. 28, Ls. 1-7.) Ivie's appellate argument that the district court should have given more weight to other factors or evidence does not show an abuse of discretion. Application of the correct legal standards shows the sentence to be reasonable and not an abuse of discretion.

CONCLUSION

The state respectfully requests this Court to affirm the sentence of life with seven years fixed upon Ivie's conviction for lewd conduct.

DATED this 17th day of November, 2016.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 17th day of November, 2016, served two true and correct copies of the foregoing BRIEF OF RESPONDENT by placing the copies in the United States mail, postage prepaid, addressed to:

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KKJ/dd